Supreme Court, U.S.
FILED
JAN 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-861

In the Supreme Court of the United States

OCTOBER TERM, 1985

HADDON HOUSE FOOD PRODUCTS, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROSEMARY M. COLLYER
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
ROBERT E. ALLEN
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
DAVID FLEISCHER
Attorney
National Labor Relations Board
Washington, D.C. 20570

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2201

QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner violated Section 8(a)(1), (2) and (3) of the National Labor Relations Act by recognizing a union which, due to petitioner's unremedied unfair labor practices, did not represent an uncoerced majority of petitioner's employees.

2. Whether the Board properly found, alternatively, that petitioner violated Section 8(a)(1), (2) and (3) of the Act by according recognition to one union, in an initial organizing campaign, when another union had filed a valid representation petition with the Board.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

American Bread Co. v. *NLRB*, 411 F.2d 147	11
American Can Co. v. *NLRB*, 535 F.2d 180	10
Bruckner Nursing Home, 262 N.L.R.B. 955	6, 7, 8, 9, 10
District 50, UMW v. *NLRB*, 234 F.2d 565	9
IAM v. *NLRB*, 311 U.S. 72	7
Iowa Beef Packers, Inc. v. *NLRB*, 331 F.2d 176	7, 10
NLRB v. *Burke Oldsmobile, Inc.*, 288 F.2d 14	7
NLRB v. *Newport Division of Wintex Knitting Mills*, 610 F.2d 430	10
NLRB v. *North Electric Co.*, 296 F.2d 137	10
Playskool, Inc. v. *NLRB*, 477 F.2d 66	9
RCA Del Caribe, Inc., 262 N.L.R.B. 963	8, 10
St. Louis Independent Packing Co. v. *NLRB*, 291 F.2d 700	10
Shea Chemical Corp., 121 N.L.R.B. 1027	8
Teamsters Local 115 v. *NRLB*, 640 F.2d 392	4, 10, 11

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*	1
§ 8(a)(1), 29 U.S.C. 159(a)(1)	2, 5
§ 8(a)(2), 29 U.S.C. 158(a)(2)	5
§ 8(a)(3), 29 U.S.C. 158(a)(3)	2, 5
§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A)	5
§ 8(b)(2), 29 U.S.C. 158(b)(2)	5

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-861

HADDON HOUSE FOOD PRODUCTS, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A15) is reported at 764 F.2d 182. The decision and order of the National Labor Relations Board (Pet. App. A16-A41) are reported at 269 N.L.R.B. 338.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1985. A petition for rehearing was denied on August 22, 1985 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on November 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

Relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*), are set forth at Pet. 2-3.

STATEMENT

1. In November 1975, Teamsters Local Union No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, obtained signed authorization cards from 27 of petitioner's 56 employees.[1] On November 19, 1975, Local 115 filed a petition for a representation election with the Board. This petition was never dismissed or withdrawn, although the Board did hold it in abeyance because of unfair labor practice charges filed by Local 115 against petitioner on November 21, 1975. Pet. App. A6.

A complaint was issued, and a hearing held, on the charges filed by Local 115. The Board found that petitioner had engaged in numerous independent violations of Section 8(a)(1) of the Act and had violated Section 8(a)(1) and (3) by discharging eight employees because of their union activities and refusing to reinstate 14 unfair labor practice strikers. The Board ordered petitioner: (i) to cease and desist from these unfair labor practices and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights; and (ii) to offer reinstatement, with backpay, to the 22 employees unlawfully discharged or denied reinstatement. *Haddon House Food Products, Inc.*, 242 N.L.R.B. 1057, 1057-1059, 1065-1069, 1073 n.5, 1075 (1979).

The Board further concluded, however, that these standard measures were inadequate to remedy petitioner's "extraordinary violations" (242 N.L.R.B. at 1059 n.11), which the Board found "[were] such that they [were] likely to have a continuing coercive effect on the free exercise by employees of their [statutory] rights long after the violations * * * occurred" (*id.* at 1058). For this reason, the

[1] The two employers in this case, Haddon House Food Products, Inc. and Flavor Delight, Inc., are under common ownership and management, and they accordingly will be referred to herein as "petitioner."

Board also provided certain additional remedies "designed to dissipate as much as possible the lingering atmosphere of fear created by [petitioner's] unlawful conduct and to insure that if the question of union representation [were] placed before employees in the future they [would] be able to voice a free choice" (*ibid.*).[2]

---

[2] Specifically, the Board ordered petitioner to take the following steps (242 N.L.R.B. at 1058-1059 (footnotes omitted)):

> (1) in addition to posting copies of the attached notice marked "Appendix" at its Medford, New Jersey, facility, include it in the appropriate company publications and mail it to each individual employee at his or her home address, including but not limited to all employees on the payroll at the time the unfair labor practices were committed; all such notices, both mailed and posted, to be signed personally by [petitioner's] owner and manager, Harold Anderson, who shall also read the notice to current employees assembled for that purpose. [Petitioner] shall afford the Board a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice; (2) publish in local newspapers of general circulation a copy of the above notice two times per week for a period of 4 weeks; (3) upon request, grant [Local 115] and its representatives reasonable access to [its] bulletin boards and all places where notices to employees are customarily posted; (4) upon request, grant [Local 115] reasonable access to [its] plant in nonwork areas during employees' nonwork time; (5) supply [Local 115], upon request made within 1 year of the date of this Decision and Order, the names and addresses of [its] current employees; (6) give notice of, and equal time and facilities for [Local 115] to respond to, any address made by [petitioner] to [its] employees on the question of union representation; and (7) afford [Local 115] the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled in which [it] is a participant. Provisions (3), (4), (6) and (7), above, shall apply for a period of 2 years from the date of the posting of the notice provided by the Order herein or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first.

On January 26, 1981, the Court of Appeals for the District of Columbia Circuit upheld the Board's unfair labor practice findings and enforced its remedial order with but one modification (*Teamsters Local 115* v. *NLRB*, 640 F.2d 392), observing that petitioner's conduct "constituted 'a well-orchestrated antiunion campaign that featured repeated and egregious violations' " (*id.* at 395, quoting 242 N.L.R.B. at 1061 (Chairman Fanning and Member Jenkins, concurring and dissenting)).[3] The court of appeals sustained the Board's refusal to issue an order requiring petitioner to bargain with Local 115, despite the pervasive nature of petitioner's unfair labor practices. The court so ruled because, although Local 115 had demonstrated that it had the support of 27 of the 54 or 55 employees in the bargining unit, that support fell short of actual majority status. *Id.* at 395-396. Both petitioner and Local 115 filed petitions for a writ of certiorari, which this Court denied on October 5, 1981. 454 U.S. 827, 837.[4]

2. On or about June 15, 1981—while the petitions for a writ of certiorari were pending in this Court and before petitioner had complied with the Board's remedial order that had been enforced by the court of appeals—Local 80, Food and Allied Service Workers, chartered by the United Food and Commercial Workers, AFL-CIO, commenced its own organizational campaign among petitioner's employees. On July 8, 1981, the American Arbitration Association, after conducting a check of authorization cards signed by employees, certified that a majority of the

[3] The District of Columbia Circuit declined to enforce the requirement that petitioner's owner personally read the notice to the assembled employees (see note 2, *supra*), holding instead that any responsible officer of petitioner could read the notice. 640 F.2d at 403-404.

[4] Local 115 sought review of the court of appeals' decision insofar as it sustained the Board's refusal to issue a bargaining order in the absence of evidence that Local 115 had ever achieved majority status. Petitoner sought review of the extraordinary remedial measures which were enforced by the District of Columbia Circuit.

employees desired representation by Local 80. However, Local 115 was not notified of the card check, and the American Arbitration Association was not notified of Local 115's pending election petition or of petitioner's unremedied unfair labor practices (Pet. App. A20 & n.5).

After the card check, petitioner recognized Local 80 as the exclusive bargaining representative of its production and warehouse employees. Thereafter, on or about July 24, 1981, petitioner and Local 80 entered into separate collective bargaining agreements for each of the two groups of employees; each agreement contained a union-security clause. At the time of its recognition of Local 80 and execution of the contracts, petitioner had offered reinstatement to 19 of the 22 employees entitled to reinstatement under the Board's previous order, but had not complied with any of the extraordinary remedial provisions of that order. At all relevant times, Local 115 maintained a continuing interest in representing petitioner's production and warehouse employees—as evidenced by its then-pending petition for a writ of certiorari seeking review of the denial of a bargaining order—and Local 80 assertedly had no knowledge of Local 115's pending representation petition or petitioner's unremedied unfair labor practices. Pet. App. A20-A22 & n.7, A24 & nn.9, 10.

The Board found that petitioner violated Section 8(a)(1), (2) and (3) of the Act (29 U.S.C. 158(a)(1), (2) and (3)) by recognizing Local 80 and entering into the collective bargaining agreements containing union-security clauses.[5] These findings rested on two independent grounds. First, the Board relied on the fact that Local 115's valid election

[5] The Board also found that Local 80 violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. 158(b)(1)(A) and (2)) by accepting recognition and entering into contracts containing union-security clauses. These findings also were affirmed by the court of appeals, on the same grounds upon which the court affirmed the findings against petitioner (see pages 6-7, *infra*). Local 80, whose recognitional rights are at stake in this case, has not sought review in this Court.

petition was still pending when petitioner recognized Local 80. For this reason, the Board held that petitioner's recognition of Local 80 was contrary to the Board's decision in *Bruckner Nursing Home*, 262 N.L.R.B. 955 (1982), which bars an employer from granting initial recognition to a union after a rival union has filed a valid election petition (Pet. App. A23-A25). Second, in view of the continuing coercive effect of petitioner's unremedied unfair labor practices, the Board found that Local 80 could not be deemed to have represented an uncoerced majority of petitioner's employees at the time of recognition (Pet. App. A25-A26).

On these alternative grounds, the Board ordered petitioner to cease and desist from the unfair labor practices and from otherwise interfering with, restraining or coercing its employees in the exercise of their statutory rights; to withdraw and withhold recognition from Local 80 until and unless Local 80 is certified by the Board; to reimburse employees, jointly and severally with Local 80, for all initiation fees, dues, assessments, or other payments made pursuant to the contractual union-security clauses; to grant Local 115, for a period of 2 years, the right of access as set forth in the Board's previous order (see note 2, *supra*); and to post appropriate notices (Pet. App. A27-A39).

3. The Court of Appeals for the Third Circuit enforced the Board's order, sustaining both of the grounds relied upon by the Board in finding petitioner's recognition of Local 80 to be unlawful (Pet. App. A3-A15). The court held that the Board's *Bruckner* policy was "a satisfactory accommodation of the sometimes conflicting policies of prompt recognition of majority collective bargaining representatives and of uncoerced free choice in the selection of such representatives" (*id.* at A12) and that the policy was consistent with prior Third Circuit decisions (*id.* at A12-A13). The court of appeals further held that substantial evidence in the record as a whole supported the Board's finding that Local 80 did not represent an uncoerced majority of petitioner's employees, because the

lingering effects of its prior unfair labor practices made unfettered employee free choice unlikely so long as those unfair labor practices remained unremedied (*id.* at A13-A14).

ARGUMENT

1. Petitioner challenges the Board's position, enunciated in *Bruckner Nursing Home, supra,* and upheld by the court of appeals, that the pendency of Local 115's election petition precluded it from according initial recognition to Local 80 irrespective of whether Local 80 represented an uncoerced majority of the unit employees. However, as the court of appeals concluded (Pet. App. A9), the Board's finding, also upheld by the court of appeals, that Local 80 in fact did not represent an uncoerced majority of the unit employees is dispositive of this case. Petitioner does not challenge that finding here. Indeed, in the prior proceedings, the Board specifically found that petitioner engaged in "numerous and egregious" violations of the Act (242 N.L.R.B. at 1057) and that extraordinary remedies were necessary to dissipate the coercive effect of those violations (*id.* at 1058-1059). The District of Columbia Circuit sustained these findings (640 F.2d at 395, 399-403), and this Court denied review. Petitioner does not dispute—nor could it—that serious, unremedied unfair labor practices would taint Local 80's showing of majority support. See *IAM* v. *NLRB*, 311 U.S. 72, 77-79, 82 (1940); *Iowa Beef Packers, Inc.* v. *NLRB*, 331 F.2d 176, 184 (8th Cir. 1964); *NLRB* v. *Burke Oldsmobile, Inc.*, 288 F.2d 14, 16 (2d Cir. 1961).[6] Accordingly, there is no occasion for further review by this Court.

---

[6] Against this background, there is no basis for petitioner's assertions that it had committed only "technical violations of the Act" (Pet. 6) and that it "substantially remedied" those violations (Pet. 4) by complying only with the Board's reinstatement order, while refusing to comply with the notice and access provisions of the Board's order until after the Board instituted contempt proceedings.

2. In any event, petitioner's challenge to the Board's *Bruckner* rule is without merit. In *Bruckner*, the Board held that, where no union was currently recognized or certified as exclusive bargaining representative, and one of two or more competing unions filed a *valid* election petition (that is, one supported by at least 30% of the unit employees), it would be unlawful for the employer to recognize any of the rival unions based on authorization cards. However, modifying its then-existing policy, the Board held that, where no valid election petition has been filed, an employer may lawfully recognize a union that has the support of an uncoerced, unassisted majority of the unit employees, despite the existence of a rival union campaign. 262 N.L.R.B. at 957.[7] As the court of appeals explained (Pet. App. A12-A13), authorization cards are not a reliable indicator of majority support when competing unions are soliciting cards, because many employees may sign cards for both unions, making it impossible to determine which one they support. The Board reasonably determined that, where one union has filed a valid election petition and has thus demonstrated that it has obtained cards from at least 30% of the employees, there is a substantial risk that a second union's card majority does not really reflect majority support because it includes employees who have signed cards for both unions. Accordingly, the Board reasonably concluded that a card check in these circumstances is not an adequate substitute for a secret-ballot election.[8]

---

[7] In *RCA Del Caribe, Inc.*, 262 N.L.R.B. 963 (1982), a companion case, the Board, overruling *Shea Chemical Corp.*, 121 N.L.R.B. 1027 (1958), held that the filing of a petition by a rival union does not relieve an employer of its obligation to continue to bargain with an incumbent union. 262 N.L.R.B. at 965 & n.12.

[8] In the instant case, Local 80 had 39 cards in a unit of 73 employees. However, petitioner neither informed Local 115 of the card check nor alerted the American Arbitration Association, which

Moreover, as the Board explained in *Bruckner*, 262 N.L.R.B. at 957, "[m]aking the filing of a valid petition the operative event for the imposition of strict employer neutrality in rival union, initial organizing situations will establish a clearly defined rule of conduct and encourage both employee free choice and industrial stability." If the rival union has not filed an election petition, the employer may recognize the first union, as long as it actually has valid majority support. If the rival union does file a petition, but does not have the support of at least 30% of the unit employees, its petition will be promptly dismissed; thus, it will not be possible for a union with minimal employee support to block recognition of a union with clear majority support. On the other hand, if the petitioning union does have 30% support, the employer, upon receiving notice of the petition, will know that there is a serious contest for its employees' allegiance and that, in order to avoid unduly influencing that contest, it should refrain from recognizing any union until an election is held.

Petitioner concedes (Pet. 8) that no other court of appeals has considered the *Bruckner* rule since the Board adopted it. In arguing (Pet. 8-11) that the decision of the court of appeals here conflicts with decisions of other courts, petitioner relies, in part, on cases in which the Board decisions rejected by courts of appeals do not reflect the Board's present rule.[9] In most of the other

---

conducted the card check, of Local 115's interest and of the resulting possibility of dual signatures. Particularly on these facts, the card check cannot be viewed as sufficiently reliable evidence of Local 80's majority status. Moreover, Local 115 had obtained authorization cards from considerably more than 30% of petitioner's employees—and in fact almost attained majority status—at the time its election petition was filed.

[9] In *Playskool, Inc.* v. *NLRB*, 477 F.2d 66, 67-68, 71-72 (7th Cir. 1973) (Pet. 10), no petition had been filed by the rival union. In *District 50, UMW* v. *NLRB*, 234 F.2d 565, 569 (4th Cir. 1956)

cases cited by petitioner, the courts upheld the Board's decision.[10] The only cited case directly involving recognition of one union in the face of a valid rival election petition in an initial organizing situation in which the Board's finding of unlawful recognition was reversed is *NLRB* v. *Newport Division of Wintex Knitting Mills,* 610 F.2d 430 (6th Cir. 1979). That case was decided without the benefit of the Board's rationale in *Bruckner.* Moreover, the Sixth Circuit's per curiam order in *Wintex Knitting Mills* relied on the fact that the rival union that had filed a representation petition appeared to have ceased its organizational activity by the time the employer recognized the other union. 610 F.2d at 431. There was no such evidence here. Indeed, it was clear to petitioner when it recognized Local 80 that Local 115 retained its interest in representing the employees, because Local 115 was still seeking a bargaining order. Moreover, the Sixth Circuit in *Wintex Knitting Mills* indicated that its holding depended on the

---

(Pet.11), the rival union's petition had been dismissed. Under *Bruckner,* the Board would not now bar recognition on the basis of a showing of majority support of one of two competing unions in such circumstances. *NLRB* v. *North Electric Co.,* 296 F.2d 137, 139-140 (6th Cir. 1961) (Pet. 9) involved continued recognition of an incumbent union, which would be sanctioned under *RCA Del Caribe,* discussed at note 7, *supra.*

[10] In *St. Louis Independent Packing Co.* v. *NLRB,* 291 F.2d 700, 704-705 (7th Cir. 1961) (Pet. 11), the court upheld the Board's position that the employer was required to remain neutral in the face of the Board's direction of an election. In *American Can Co.* v. *NLRB,* 535 F.2d 180, 183, 186-188 (2d Cir. 1976) (Pet. 11), the court found that in the particular circumstances of a representational issue involving a relocation, the Board properly found that a question concerning representation had been raised. In *Iowa Beef Packers, Inc.* v. *NLRB,* 331 F.2d 176, 181-184 (8th Cir. 1964) (Pet. 9-10), the court upheld the Board's decision that the employer unlawfully recognized one competing union in the face of a rival petition where the employer also rendered unlawful assistance to the former.

fact that one of the two rival unions had "convincingly demonstrated its majority status, [11] without any help from the employer." 610 F.2d at 431, citing *American Bread Co.* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969). In this case, by contrast, Local 80 obtained cards from only slightly more than half of petitioner's employees, and petitioner's "repeated and egregious" unfair labor practices (640 F.2d at 395) that were calculated to discourage Local 115's organizing activities—and were still unremedied—had the effect of assisting Local 80.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
ROBERT E. ALLEN
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
DAVID FLEISCHER
Attorney
National Labor Relations Board

JANUARY 1986

[11] The union had obtained authorization cards from 96 of the 135 employees, well in excess of a bare majority. 610 F.2d at 431.

U.S. GOVERNMENT PRINTING OFFICE: 1986 — 491-507/20139